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MARKETS, RIGHTS, AND INTERESTS

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Abstract

Land-use planning is often seen as opposing the market and as restricting the exercise of property rights. That practice is justified by referring to the need for a public authority to act in the public interest. This paper rejects that line of reasoning. Instead, it focuses on the interests which people have in the way in which land is used. Some of those interests are protected by private law: they are property rights. The holders of property rights can exercise them in the market. Other private interests in land are recognised by the state but are not given the status of property rights. Those interests are protected by a public authority using public law on behalf of its citizens. This is the activity of land-use planning. The resulting land use is the result of people exercising their property rights in a context imposed by a public authority in order to protect other private interests in land. However, the distinction between interests which are protected as property rights and interests which are protected by land-use planning is not absolute and is the result of a political decision. This paper investigates whether some of the goals of land use planning could be realised by changing interests into rights in such a way that markets in those rights would realise the desired land use.

Keywords: Markets and planning; property rights; the public interest:

Introduction

I start with a working definition of land-use planning. This refers to the activities of public authorities when they try to achieve some politically determined goal by deliberately influencing the way in which land in a certain area is used. The goals aimed at in this way can be various: more efficient production, reducing unemployment, improving conditions in residential areas, reducing accidents from traffic, transport which is more ecologically sustainable, protecting wildlife habitats, making town centres more pleasant, providing more affordable housing, and so on. A public authority expects that if the desired land use is realised, the goals will be (more nearly) reached. So it carries out land-use planning in order to realise that land use.

In this paper I question neither the legitimacy nor the value of the state trying to influence land use on behalf of its citizens. Nor do I question whether the assumed causal link between the desired land use and achieving the goal is always correct. But I do question the methods by which the public authority carrying out that planning tries to realise the desired land use. The paper is based on Needham (2005a), where the argument is worked out in much more detail.

The usual way of carrying out land-use planning is by making building and development conditional on the granting of a permission, which is given only if the initiative conforms to a plan or policy. We can call this 'regulation'. Here I investigate an alternative to this, namely creating markets in property rights in such a way that the initiatives which people take (automatically) realise the goals of the planning policy. To the extent that this alternative is feasible, it has advantages over the usual way of carrying out land-use planning. People are freer in how they decide to use their land and buildings. Also, if people enjoy property rights, they can use them to protect themselves against those who have excessive power. At the same time, people have more responsibility for creating and maintaining their own surroundings. The question is: is it possible to arrange this in such a way that the publicly chosen goals of land-use planning are still met? It will be seen that such a way of carrying out land-use planning is politically neither more right nor more left than the more usual way.

My conclusion is that this alternative would be feasible and effective under some circumstances, but not under others. In particular, it could be used to achieve a good neighbourhood quality, that is residential and business

areas with a good and lasting amenity. It would not be effective in achieving the goals of land-use planning at a regional scale.

Influencing land use

Achieving the goals of land-use planning depends on how land is *used*, not on who *owns* it. Moreover, the decisions which people make about using land are taken voluntarily. There is no authority which says how the owner of a land or building must use it, nor that the owner may not buy or sell, nor who may own what land and who may not.

A public authority which wants to influence the way in which land in a given location is used, needs therefore to understand how the owners make decisions about using their land. The public authority itself has no right to take those decisions, unless it owns the land. Land-use planning will succeed only if it can *influence* the private decisions.

How can that influence be exerted? The way we are most familiar with is development control. This is how it is described in English planning terms, in other countries it is called the building permit, or the zoning permit, or some such. The content is always more or less the same: if you want to change the use of your land, you must first obtain permission, which is granted only if the proposed change conforms to the land use desired by the public authority. Other ways which can be found in practice are: giving a subsidy to a land-use decision which is desired, or imposing a levy on an undesired land-use decision; persuasion and encouragement to take the land-use decision which the public authority desires; and providing roads and other infrastructure which makes some uses more attractive than others..

The decision remains free, but is influenced or constrained. The decision ceases to be free if ownership is taken away, amicably or compulsorily. That is common when no-one besides the public authority is interested in making the desired land-use change, for example providing open space or a road.

Land-use planning and interests in land

Why should a public authority want to influence decisions about land use? The answer is that the land use resulting from all the decisions made by private (legal) persons is not always what the public authority wants. So that authority wants to change those decisions ‘in the public interest’.

This formulation I do not find satisfactory. It implies that in a particular area one way of using land is more ‘in the public interest’ than another way. That is exceedingly difficult to substantiate. (Following Alexander 1992 we make a distinction between a substantive and a procedural interpretation of the public interest. Saying that a particular land use is in the public interest is an example of the substantive interpretation.) Economics offers the substantiation in terms ‘distortions’ caused by external effects, monopoly conditions, public costs, and so on: but those arguments too no longer convince (see e.g. Lai 1994).

One of the main problems with the idea of ‘the public interest’ is that it suggests that you and I, as individuals, might have to be constrained or influenced in the interest of ‘the public’. But we too are the public! And who are the other members of the public who will be benefited by constraining us? Talking of ‘the public interest’ has a similar effect to talking – as many economists do – of ‘social costs’ (Bromley 1991: 19). The others, who are effected by our actions, are de-personalised into an amorphous and unidentifiable ‘public’ or ‘society’.

In order to avoid that depersonalisation, we look more closely at peoples’ interests in the way in which land is used. It is clear that, if I own a parcel of land, I have an interest in the way in which that parcel is used. But I have an interest too in the way in which my neighbour uses her land, for that can affect me. For example, I do not want her to dig such a deep hole in her garden that the foundations of my house are endangered. And on a larger geographical scale, and whether or not I own land, I have an interest in how others use their land. I have an interest in my neighbour not painting her front door bright pink. I have an interest in how much traffic uses my street. I have an interest in the vitality of the shops in my town centre. I have an interest in the conservation of an open landscape. I have an interest in clean air.

We can now give a different answer to the question: why does a public authority want to influence the land-use decisions made by private persons? It is because the decision by one person about the use of her land can affect the interests of another person. The authority is acting not so much to uphold some general public interest, as to uphold the identifiable interests of many identifiable private persons.

Land-use planning and rights in land

The complication arises that the state upholds the interests of private persons in land in another way too, namely by creating and protecting property rights. And – it will be clear – those two ways can clash, and often do clash. The right to own landed property includes the right to use that property in a particular way. Moreover, the right of ownership is strongly protected (see for example article 1 of the Protocol to the European Convention on Human Rights: ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions’). Land-use planning can restrict the exercise of that right. So it is not surprising that land-use planning is often politically contested.

Before we investigate further the possible clashes between a public authority upholding the interests of its citizens by land-use planning and the state upholding such interests by making of them property rights, it is useful to put the right of ownership in perspective.

Most countries have an extensive legal system of property rights regulating the use of land. The reason is that land use is very important for the functioning of the society, both economically and socially. Property rights give a person security to use a piece of land in a particular way, and that security helps the market to work efficiently and stabilises social relationships. Landlord/tenant legislation illustrates that well. The landlord has certain rights, the tenant also, and those rights help the market in tenancies to work.

Ownership is, however, never absolute (in spite of the statement in article 17 to the ‘Declaration des droits de l’homme en du citoyen’ in 1798 that ownership was ‘inviolable et sacré’). The most important restriction is that the owner is not allowed to use the land in a way which harms others. How the law regulates this varies greatly from country to country, but the principle is the same everywhere (Honoré 1961). It is the details which are interesting. For in spite of the general principle, most countries *do* allow the owner of land to use it in ways that harm others, if that use gives more benefit than the harm it causes. The dog is not allowed to sleep in the manger, even if he owns it, if the horse has no other source of food. Squatters can claim rights from landowners.

There is a second type of restriction too, namely when the owner of the freehold right voluntarily restricts herself by granting a partial right to someone else. That other person acquires the right to use the land in a particular way, such as a ground lease: and the court protects the holder of that partial right, if necessary against the owner of the freehold right.

Those two types of restriction have nothing to do with land-use planning. They concern the ‘traffic’ between private legal persons. If one private person harms another, or interferes with the exercise of a right by another, that other (the plaintiff) may take the doer of the deed (the defendant) to court. The action is taken by a *private* person. The court, of course, has to be a *public* institution, for it might be necessary to use force against one of the two parties, and the state is the only agency legitimised to use force. But, crucially, the initiative to enforce the restriction is taken by a private person, not by the state.

However, the state will not uphold laws which it does not support. It follows that the state must define property rights (or, under case law, recognise property rights): what they allow and do not allow, how they will be enforced, the punishment for transgressing a right, and so on.

In order to understand the full significance of this, we have to refine our understanding of a property right. It is a way of using land (and buildings), *where that way is recognised by, and protected by, the courts*. That addition is of paramount importance. If, for example, I rent my land to a farmer, I give that person rights over my land. If I want to get rid of the farmer in order to sell the land to a housing developer, the courts will not recognise my action if the right which the farmer has acquired from me protects him from eviction.

This fact undermines yet further the idea that property rights are or can be absolute. For they are created by the state. ‘It is the fact that something is protected that makes it a right, rather than that something is protected because it is a right.’ (Bromley 1998). It follows that different state governments can create different property rights. And those international differences exist in practice, as empirical investigation shows, and as the examples later in this paper illustrate.

Two ways in which the state protects interests in land

There are, therefore, two ways in which the state protects peoples' interests in land. One way is to declare an interest a property right. That declaration is accompanied by rules allowing the owner of a property right to protect her right in the courts. That we call the 'private law' way of protecting interests: the holder of the interest uses private law to protect herself. The other way is when the state gives a public authority (such as a municipality) powers to influence the way people with property rights exercise their right to change the use of the land, where the public authority does that in order to protect the interests of those who might be harmed by the exercise of property rights by others. This we call the 'public law' way of protecting interests: the public authority uses public law - taking to court someone who breaches the rules, such as building contrary to a building permit - to protect the interests of those who cannot protect their interests in any other way.

The question then arises: which of the many interests which a person can have in land does the state protect by giving that person a property right, which of the interests are protected on behalf of the person by a public body authorised to do that, and which are not protected at all?

The answer to this is partly political. I am given no right to protect my interest in the colour of my neighbour's front door, nor will a public authority do that for me. The reason is that, it has been decided, *my* interest in that colour is less important than *her* interest in the colour.

The answer is partly technical too. If my neighbour damages the foundations of my house, there is a clear connection between the cause and the effect, and between the person responsible for the cause and the person harmed, moreover there are just a few people involved. So it is feasible for me to exercise a right to take the perpetrator to court for the damage caused to me. And, in fact, in many countries I do have that right (the 'right of support'). If, on the other hand, a factory pollutes the air breathed by hundreds of people, that connection between cause and effect is less clear, moreover it would be extremely difficult for those hundreds of people to co-operate to take an action against the factory. So giving a person a property right to clean air would be ineffective in protecting that person's interest in clean air.

It is for that reason that my interest in undamaged foundations is protected by giving me a property right, but my interest in clean air not. Nevertheless, the state recognises that latter interest. And it protects it by *public measures* such as conditional permissions (a building permission will not be given if the factory is too near to housing) or an outright prohibition (limits on the emission of certain gases).

However, the decision to protect some interests by private law and other interests by public law can always be revised. This is often not recognised, for we have the tendency to think of property rights (the private-law rules) as being absolute. Enough has been said above to show that property rights are never absolute, also that they are not 'natural' but created, or recognised, by the state.

It follows from this that property rights can be a 'policy variable'. A well known example is inheritance laws, which are designed to prevent an unhealthy accumulation of wealth. Policy rights can be purposefully changed in order to achieve a particular outcome. (It must be added that rights in land often have a high ideological content, as a result of which they are not changed easily or quickly.)

The corollary is that, as property rights influence the way land is used, and as property rights have been created, then property rights can be deliberately changed in order purposefully to influence land use. We are familiar with such policy, under the heading of 'land reforms'. But we do not usually make the link with land-use planning, nor recognise that creating and changing property rights can be used as an instrument of land-use planning. Here we make explicit, that it can be decided to pursue the goals of land-use planning by changing property rights, thus shifting from public-law rules to private-law rules.

We work out this idea later. First we illustrate it briefly by applying it to the wish that non-replaceable resources be used sustainably. Usually that goal is pursued by restrictions (public law) on using such resources. If we look at the interests involved, we see that by pursuing our interests *now*, we are endangering the interests of *future generations*. Perhaps we can protect those future interests by making them into property rights (Bromley 1991: 19). Those rights would then be vested in the generation which will be 21 in - say - 50 years, and trustees would be appointed to protect those rights until then.

Land-use planning and markets

It is now time to introduce the concept of ‘the market’. We started by pointing out that most decisions to change the use of land are made voluntarily. We can express this by saying that most of those decisions come about ‘in the market’. This might be a broader way of using that term than some are accustomed to. There is a market when one person has something which another person wants, and an exchange takes place voluntarily, whereby the ‘demander’ is free in the choice of ‘supplier’ and the ‘supplier’ is free in the choice of to whom she supplies. Lindblom (2001) points out that it is almost impossible to conceive of processes, such as those by which land use comes about, where there are no voluntary decisions. That is, processes where the market is excluded.

It follows from this, that a discussion in terms of ‘planning or the market?’ is not useful. The market cannot be excluded from influencing land use. The only question which is interesting is about the *mix* of planning and the market (Buitelaar 2003).

It follows also, that when someone exercises her property right in land, that is an action ‘in the market’. So the decision whether an interest in land should be protected by private law (property rights) or by public law (planning by regulation) is a decision about the mix of planning and the market. Another conclusion is that the decision to shift that protection from public law to private law by creating or changing property rights is tantamount to creating markets in property rights. For that shift creates new exchange structures, within which people can interact freely and willingly.

Creating markets in property rights

Sometimes there can be a real choice for the state between protecting a person’s interest on the one hand by creating an appropriate property right, and on the other hand by imposing public measures. The two cases discussed later illustrate this.

This choice has been the subject of a number of publications. Coase (1960) examined the economic arguments, by pointing out the reciprocity of the actions: if one person’s actions damage me, then restricting those actions benefits me but harms the other person. ‘The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is, How should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would be to inflict harm on A. The real question that has to be decided is, Should A be allowed to harm B or should B be allowed to harm A?’ (op. cit: 96). So the decision to elevate an interest into a right should be based on a study of the economic effects of making the interest legally defensible. Ellickson (1973) made a most thorough investigation with the title ‘Alternatives to zoning: covenants, nuisance rules, and fines as land use controls’. He was motivated by the preference for private law measures (that is, through property rights and tort law) over public law measures (such as zoning). He concluded that private law measures could effectively be used in some situations, but not in all. And more recently, Webster & Lai (2003) have conducted a similar exercise, to investigate whether problems caused by ‘resources in the public domain’, which are usually tackled by public law measures, could not better be tackled by changing property rights so as to make those resources ‘club goods’.

Those investigations must not be confused with attacks on land-use planning by those who resist any restriction on the exercise of individual property rights. For those latter attacks either deny the external effects of the private use of property (that is, they deny that there is any ‘public interest’ involved), or they deny the ability of a public authority to protect the interests of ‘the public’. (A classical statement of this ‘libertarian’ stance is to be found in Sorensen 1981.)

The investigations I have mentioned do not reject the goals aimed at by much land-use planning, nor the legitimacy of the state influencing land use. Rather, they ask the question: is it always necessary to try to achieve those goals by public law regulation of the use of property rights? Could they not perhaps be better achieved by letting people use their property rights? And – and this is crucial – the question recognises the possibility of changing existing property rights and creating new ones.

The main question remaining is: is this a realistic possibility?

To answer this, we have to take a broader approach than some economists do. These sometimes assume that the goal of all public policy is maximum economic efficiency, and that all varieties of public policy (such as for land use, but also for health, for nature protection, for education) must in the end strive to achieve that. I do not make that assumption. I take the approach described by Williamson (1995, 1999) as ‘remediability’, and I evaluate different ways of achieving the same policy goals by comparing the effectiveness with which they do that.

So the question becomes: which of the goals commonly adopted for land-use planning could be achieved by creating new markets in property rights and by withdrawing some of the public controls on land use? Would those goals be achieved better in that way? What would be the consequences for the use of scarce resources? And what would be the distributional effects?

It will be clear that we cannot answer all those questions in one short paper. Answers are given by me in Needham (2005a) and Needham (2005b), where also the theoretical arguments are given much more fully. Here I can do no more than report briefly a few of the conclusions of my investigations.

Amenity in housing estates

It is an aim of land-use planning that housing estates be developed where residents can live in pleasant surroundings and with the security that those surroundings will continue to be pleasant. One way of doing that is by making a land-use plan which specifies the conditions which must be met by any development on the estate, by refusing a building permit for an application which does not conform to those conditions, and by monitoring subsequent changes to check that they do not transgress the conditions. This might be coupled with an environmental policy, also realised by granting or refusing permits.

An alternative way of achieving the same goals is by requiring people who buy a house in that area to enter into a covenant, whereby they restrict themselves from taking certain actions which would damage the amenity of the estate, and by vesting the right of covenantee in a residents' association. This association is then responsible on behalf of its residents for monitoring whether a house owner fulfils the terms of the covenant and, if she does not, for taking legal action on behalf of the other residents. The *interest* which the residents have in the amenity of their area has been transformed into a *property right* (Grant 1988).

That might seem to be a draconian measure: but it is entered into freely by very many people in the United States ('private community associations') and also, but less commonly, in England ('a scheme of development'). Clearly, there are many people who are prepared to restrict themselves, if their neighbours also are similarly restricted, in order to protect the amenity of their housing estate. And equally clearly, this is a feasible alternative to pursuing the same goal through land-use plans and building permits.

It illuminates my general argument to ask the question: why do we not find similar arrangements in the Netherlands? The answer is: such an arrangement is not legally binding in that country, for the system of property rights there does not permit people to be obliged to become a member of a residents' association. In other words, Dutch property rights do not allow a market solution to the problem of achieving and maintaining residential amenity. Dutch property rights could be changed so as to make that possible. That is an example of how a market in property rights could be created, thus providing an alternative way of pursuing some of the goals of land-use planning

Well maintained industrial estates

It is an aim of land-use planning to make it possible to develop industrial estates, which have the properties which the firms operating there want, and where those properties are protected and maintained. The way in which land-use planning can do this is similar to the way in which that planning creates housing estates with the required amenity: building/planning permits supplemented with environmental permits. This is, however, not effective in *maintaining* the quality of the estate.

In England and the United States, this shortcoming can be overcome if someone has a right in land which makes it possible and profitable to maintain the desired qualities. The solution is easy and well known. A developer constructs an estate, sells the completed estate to a property investor, which then leases the buildings to the firms which occupy them. The investor then maintains the estate as a whole. If he does this well, his investment will retain its value. The quality is maintained by a 'market instrument'. The individual firms have a lasting interest in the quality of their estate, but it is not feasible to change that into a property right which could be used for that purpose. So the interests of all the separate firms are taken over by one landlord, who does have the property right which is necessary to protect that interest.

Once again, this solution is not possible in the Netherlands, because the system of property rights does not permit it. If the firms on the estate own their buildings, it is difficult to oblige them to become a member of an association which maintains the shared spaces. Moreover, the firms are reluctant to rent their buildings for a long

period, because the tenancy is not transferable: so there is little investment interest in industrial buildings. The result is that although many firms have an interest in maintaining the quality of the estate, no-one has property rights which would enable that to be done. As a result, the estate deteriorates quickly, and the only way of improving it is by the expenditure of huge amounts of public money.

The market solution could be introduced into the Netherlands by changing a property right, namely by making rental leases transferable.

Coherent regional development

The aim of most land-use planning at the scale of the region is to take account of the interactions between the various activities in different locations within the region. If all the workers live in one location and all the workplaces are in another, this will result in many long work journeys, which are undesirable because of the amount of time lost, the congestion, the transport infrastructure, the traffic fumes, etc. If attractive countryside and valuable farmland are being built upon, while there is abandoned and developable land elsewhere, this is undesirable because of the loss of amenity in one location and the under-use in another. If houses are built in very dispersed locations and at low densities, the experience of open countryside that many people value is reduced, and public transport to serve those houses is uneconomical.

The usual planning (public law) way of influencing land use decisions to take account of such interactions is with land-use plans which allow certain types of development in certain types of location and forbid it in other locations. Often this is supplemented with the provision of roads etc. which influence decisions in a complementary way. Could that be replaced by creating markets in property rights, so that people automatically take account of the interactions?

It is clear that this is much difficult than at the scale of the housing and the industrial estate. The reason is that the interests which are affected by the land-use decisions of one person are very dispersed. There can be so many people who are affected, positively or negatively, and the effects can be so small for each of those people even though the total effects are great, that it is not realistic to expect that a market in rights could be set up.

What we do find, interestingly, is that a public authority sometimes tries to achieve the desired land use on behalf of its citizens, using private law rules instead of the usual public law rules. The conservation agreements found in many parts of the United States are an example: a public or a private trust acquires amicably the right to change the use of farm land (Daniels & Bowers 1997). The farmer retains ownership rights, and has sold the development rights to an agency which does not intend to use them. That agency has acquired the rights in order to stop others using them, thus keeping the land open.

Conclusions

We have investigated whether a public authority could achieve the goals of land-use planning by creating markets in property rights rather than by regulating the use of those rights. That has taken us on an interesting journey! It has thrown up all sorts of new insights which help us to understand land-use planning better. But the conclusions reached are not very radical: creating markets in property rights is a feasible alternative only under certain limited circumstances. Was the journey worth it?

I think so, for it illuminates the way in which people's interests in land are protected. The usually practice of land-use planning is to give the task of protecting those interests to a public authority. But I am not convinced that those authorities can always be trusted to do that on behalf of their citizens. Too often – in the Netherlands in any case – municipalities make deals with property developers, deals which are driven more by expediency than by protecting the public interest. How that affects rich and powerful people does not concern me very much, for such people can always look after themselves. But I am concerned about how it affects the poorer and less powerful people. I support the (rather old-fashioned) idea that the power of poorer people can be strengthened by giving them rights – which need not be full ownership rights - in landed property and encouraging them to use those powers. ‘...the Left should re-appropriate property rights (Blomley 2004: 154) ... Property relations can be the means by which people find meaning in the world, anchor themselves to communities and contest dominant power relations.’ (op.cit.: 156)

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